RAMLI SUTU

v.

PP

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CRIMINAL APPEAL NO: 42-3 OF 1998]
22 SEPTEMBER 1998

CRIMINAL LAW: *Prevention of Corruption Act 1961 - Section 4 - Corruptly accepting gratification - Whether any inducement to perform an official act - Whether presumption in s. 14 Prevention of Corruption Act 1961 rebutted - Whether accused correctly convicted*

EVIDENCE: *Corroboration - Trap witness - Whether evidence of trap witness can corroborate evidence of another trap witness - Whether can convict on uncorroborated evidence of trap witness*

EVIDENCE: *Witness - Conflicting evidence - Discrepancy in evidence of prosecution witness - Whether conviction based on such evidence proper*

This was an appeal by the appellant against the decision of the Sessions Court judge who convicted the appellant for an offence under s. 4(a) of the Prevention of Corruption Act 1961 ('the PCA'), to wit, that he had corruptly accepted a gratification in the sum of RM1,000 cash from one Cheng (PW1) as an inducement to assist PW1 to apply for a business licence.

The argument of the appellant was that the said sum was not accepted corruptly but instead was sponsorship money given by PW1 to the appellant for a certain sport event organised by the appellant's department.

Held:

[1] There were numerous discrepancies and contradictions in the evidence of PW1. The way he answered questions and explained away inconvenient answers showed that he was shifty, evasive and not reliable. The result was that the court was left with no trustworthy evidence upon which a conviction could be based.

[2] PW1 was a trap witness. A trap witness is an interested party and his evidence must be corroborated. A trap witness also cannot corroborate another trap witness. The learned Sessions Court judge had failed to adequately warn herself of the danger of convicting on the uncorroborated evidence of a trap witness and this was a misdirection.

[3] It is not the receipt of gratification alone that constitutes an offence under s. 4 of the PCA. It must be received as an inducement to do an official act. The prosecution had not adduced any evidence as to how and in what manner the appellant had assisted PW1 to obtain a license in his official function. Instead the defence had explained that the money was received as sponsorship for some jerseys. As such, the defence had rebutted the presumption under s. 14 of the PCA on a balance of probabilities.

[4] Even if the court does not believe the explanation of the defence, the court is nevertheless bound to consider whether such explanation had cast a reasonable doubt in the prosecution case. The accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. In the instant appeal, the Sessions Court judge did not, before convicting the accused, give due consideration as to why the defence story did not raise a reasonable doubt in the prosecution case regardless of whether the story could be believed or not.

[Appeal allowed; conviction and sentence set aside.]

Case(s) referred to:

Adzhaar Ahmad & Anor v. PP [1996] 4 MLJ 85 ***(cit)***
Alcontara Ambrose Anthony v. PP [1996] 1 CLJ 705 ***(cit)***
Anuar Othman v. PP [1991] 3 MLJ 382 ***(cit)***
Chiu Nang Hong v. PP [1965] 31 MLJ 40 ***(cit)***
Chong Kwee Hian v. PP [1948] 14 MLJ 191 ***(cit)***
DPP v. Kilbourne [1973] 1 All ER 440 ***(cit)***
Karthiyayani v. PP [1975] 1 MLJ 119 ***(cit)***
Khoo Cheng Huat v. PP [1991] 1 MLJ 42 ***(cit)***
Lim Kheak Teong v. PP [1985] 1 MLJ 38 ***(cit)***
Liow Siow Long v. PP [1970] 1 MLJ 40 ***(cit)***
Mahadi v. PP [1970] 1 MLJ 16 ***(refd)***
Mahmud Jamili Zaudin & Anor v. PP [1995] 4 MLJ 243 ***(cit)***
Mat v. PP [1963] 29 MLJ 263 ***(cit)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***
Mohamed Mokhtar v. PP [1972] 1 MLJ 122 ***(refd)***
Mohamed Taufik v. PP [1975] 1 MLJ 36 ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250 ***(cit)***
Pie Chin v. PP [1985] 1 MLJ 234 ***(cit)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1977] 1 MLJ 15 ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 ***(refd)***
PP v. Lim Lian Chen [1991] 1 MLJ 316 ***(cit)***
PP v. Ti Chuee Hiang [1995] 3 CLJ 1 ***(cit)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(cit)***
Ramachandran v. PP [1972] 2 MLJ 183 ***(cit)***
Rattan Singh v. PP [1971] 1 MLJ 162 ***(cit)***
Surandran Rajaretnam v. PP [1998] 2 AMR 1260 ***(cit)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(refd)***

TN Nathan v. PP [1978] 1 MLJ 134 ***(cit)***
Thong Hong Kee v. PP [1952] 18 MLJ 110 ***(cit)***

Legislation referred to:
Criminal Procedure Code, s. 422
Evidence Act 1950, s. 114(g)
Prevention of Corruption Act 1961, ss. 2, 13, 14, 18

Other source(s) referred to:
Principles Of Sentencing As Applied To Offences Relating To Bribery And Corruption, [1976] 2 MLJ xcvii

For the appellant - Chew Peng Hui; M/s Battenberg & Talma Advocates
For the respondent - Ahmad Bachee DPP

Reported by Ling Hea Hoon & WA Sharif

JUDGMENT

Tee Ah Sing J:

This is an appeal by the appellant ("the accused") against his conviction and sentence.

The accused was charged under an amended charge that reads as follows:

> That you, on the 10th day of October, 1996 at about 10.35 a.m. at Health Section of Dalat/Mukah District Council, in the State of Sarawak, being an agent of Dalat/Mukah District Council, to wit, Health Inspector attached to the Health Section of Dalat/Mukah District Council, did corruptly accept for yourself a gratification, to wit, a sum of RM1,000 cash from one Cheng Huo Kee, as an inducement to do an act in relation to your principal's affairs, to wit, purportedly to assist the said Cheng Huo Kee to apply for business licence from Dalat/Mukah District Council and that you have thereby committed an offence under section 4(a) and punishable under section 4 of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act No. 57 of 1971).

The accused was found guilty and was sentenced to eight months' imprisonment and ordered to pay to the government a penalty of RM1,000.

The learned counsel in his written submission contended, *inter alia,* as follows:

In respect of ground three, at the close of the prosecution's case serious doubts has been created with regard to the purpose of the payment because of the admissions of PW1 that money was for sponsorship and that he wanted to withdraw his complaint. PW1's ambiguity about the purpose of the money – said it was licence fee and also sponsorship – "which is which" he did not know. Ambiguity must be resolved in favour of the accused which the learned Sessions Court judge had not done. This is a fatal error. There is evidence of corroboration of sponsorship in the evidence of PW2 and PW6.

PW1 in examination-in-chief said that he reported to ACA that "they" (accused and the officers who came with him on 10 September 1996) demanded payment (p. 20 of appeal record). No attempt made by the prosecution to clarify this. So serious doubts created as to whether it was the accused who asked for payment. There is only the words of PW1 that the solicitation occurred on 10 September 1996. PW1's evidence clearly inconsistent or contradicted by his police report (P3). P3 says the solicitation occurred on 24 September 1996.

Authorities show conviction based on such discrepancy cannot stand because such evidence is not reliable. (See *Adzhaar bin Ahmad & Anor v. Public Prosecutor* [1996] 4 MLJ 85 and *Public Prosecutor v. Lee Eng Kooi* [1993] 2 CLJ 534; [1993] 2 MLJ 322).

The learned Sessions Court judge had applied the *prima facie* test instead of the beyond reasonable doubt test. This is *per se* fatal and not curable under s. 422 of the Criminal Procedure Code ("the CPC"): *Surandran a/l Rajaretnam v. Public Prosecutor* [1998] 2 AMR 1260. Even on the *prima facie* test a defence should not have been called because a *prima facie* case was not made out.

Sponsorship explanation is on a balance of probabilities true or might be true. This is corroborated by evidence of PW2 that the accused had to look for sponsorship and PW6 that the accused had on 21 September 1996 ordered from Ngiu Kee the jerseys to be sponsored and the amount and the accused had told him of the sponsorship and he had confirmed the same with DW6 of Ngiu Kee.

Sponsorship explanation given to prosecution by the accused on his arrest and in his cautioned statement given on the day of arrest according to PW5 ie, not fabrication.

The law says – if explanation of innocence is given to prosecution early the prosecution has a duty to investigate it and it becomes part of the prosecution burden to lead evidence to rebut the explanation as part of its case: *Alcontara a/l Ambrose Anthony v. Public Prosecutor* [1996] 1 MLJ 209 at pp. 210 and 219. Prosecution made no attempt to rebut accused's explanation. As such the Sessions Court judge should have held that the presumption in s. 14 of the Prevention of Corruption Act 1961 ("the PCA") had been rebutted during the prosecution's case. (See *Adzhaar bin Ahmad & Anor v. Public Prosecutor* [1996] 4 MLJ 85 at p. 93 and *Public Prosecutor v. Lim Lian Chen* [1991] 1 MLJ 316 at p. 320.

With the rebuttal of s. 14 and the state of PW1's testimony there was no beyond reasonable doubt evidence on corrupt purpose.

At the end of the defence case the serious doubts created during the prosecution case were fortified by defence evidence. Therefore the Sessions Court judge was wrong to hold that defence has not raised any reasonable doubt in the prosecution's case. She was wrong to convict on the uncorroborated evidence of PW1 because this is not an exceptional case and she failed to warn herself against the danger of doing so and this is fatal. (See *T.N. Nathan v. Public Prosecutor* [1978] 1 MLJ 134, *DPP v. Kilbourne* [1973] 1 All ER 440, *Ramachandran v. Public Prosecutor* [1972] 2 MLJ 183 and *Mahmud Jamili bin Zaudin & Anor v. Public Prosecutor* [1995] 4 MLJ 243). *Karthiyayani v. Public Prosecutor* [1975] 1 MLJ 119. Further ambiguity whether the Sessions Court judge did or did not apply her mind to danger of convicting on uncorroborated evidence should be resolved in favour of accused: *Chiu Nang Hong v. Public Prosecutor* [1965] 31 MLJ 40. PW1 as a trap witness it is unsafe to convict on his uncorroborated evidence. Section 18 of the PCA does not apply to a trap witness. The following cases were cited:

(1) *Mohamed Taufik v. Public Prosecutor* [1975] 1 MLJ 36.

(2) *Adzhaar bin Ahmad & Anor. v. Public Prosecutor* [1996] 4 MLJ 85.

(3) *Rattan Singh v. Public Prosecutor* [1971] 1 MLJ 162.

(4) *Mohamed Mokhtar v. Public Prosecutor* [1972] 1 MLJ 122.

(5) *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110.

(6) *Liow Siow Long v. Public Prosecutor* [1970] 1 MLJ 40.

As PW3 is also a trap witness he cannot corroborate PW1 because an accomplice cannot corroborate another accomplice: *Ramachandran v. Public Prosecutor* [1972] 2 MLJ 183 and *Mahmud Jamili bin Zaudin & Anor v. Public Prosecutor* [1995] 4 MLJ 243.

The defence evidence fortifies PW1's admission that payment was sponsorship.

The Sessions Court judge read the case as one of accused showing favour to PW1 by assisting him to apply for his business licence from the council (p. 349). There was no beyond reasonable doubt evidence of this because business or trading licence was not issued by the council but district office – not accused's employer (p. 254).

Asking PW1 to fill up the medical form on 30 September 1996 (and even explaining application procedure) and receiving forms on 10 October 1996 do not by themselves constitute beyond reasonable doubt evidence of doing an act in relation to his principal's affairs nor does it amount to beyond reasonable doubt evidence of showing favour to PW1 in his application for business

licence. Doing an act in relation to principal's business is not synonymous with showing favour: *Anuar bin Othman v. Public Prosecutor* [1991] 3 MLJ 382.

The learned Sessions Court judge erred in not treating PW1 as an unreliable witness. And her finding on the credibility of PW1 is not binding on the High Court because it is clearly not supported by the evidence nor based on her observations of his demeanour: *Thong Hong Kee v. Public Prosecutor* [1952] 18 MLJ 110, *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110, *Chiu Nang Hong v. Public Prosecutor* [1965] 31 MLJ 40 and *Lim Kheak Teong v. Public Prosecutor* [1985] 1 MLJ 38. Further, the reasons or grounds on which she rejected the defence case are wrong.

The learned Sessions Court judge convicted wrongly because she has erred in law and on the evidence in that she required the accused to cast a reasonable doubt on the truth of the prosecution case. In so doing she placed on the accused an unacceptable burden of having to do this on a balance of probabilities (p. 312, 354-355). This is *per se* fatal because it amounts to a misdirection in law which is not curable under s. 422 of the CPC: *Antonio Jawie, Surandran a/l Rajaretnam v. Public Prosecutor* [1988] 2 AMR 1260 and *Mahmud Jamili bin Zaudin v. Public Prosecutor* [1995] 4 MLJ 243.

The learned Sessions Court judge erred to hold that the accused had not rebutted s. 14 of the PCA. The principles require the learned Sessions Court judge to return to the infirmities of the prosecution case even if she held that the accused had not rebutted s. 14 of the PCA. She must go back to see that no reasonable doubt has been created in the prosecution case. Her failure to do so is fatal to the conviction. (See *Mat v. Public Prosecutor* [1963] 29 MLJ 263, *Chong Kwee Hian v. Public Prosecutor* [1948] 14 MLJ 191, *Mahadi v. Public Prosecutor* [1970] 1 MLJ 16 and *Khoo Cheng Huat v. Public Prosecutor* [1991] 1 MLJ 42).

The learned Sessions Court judge erred in not invoking s. 114(g) of the Evidence Act 1950 for not calling the officers who went to PW1's shop on 10 September 1996. In support the following cases were cited:

(1) *Munusamy v. Public Prosecutor* [1987] 1 CLJ 250; [1987] 1 MLJ 492.

(2) *Public Prosecutor v. Ti Chuee Hiang* [1995] 3 CLJ 1; [1995] 2 MLJ 433.

She also seriously erred in law and evidence when she held (p. 354) that "in any event, even if I were to accept accused's evidence that the said RM1,000 was "sponsorship" for family day of the council, I would still find accused guilty of corruption as it was a donation corruptly solicited and received by accused in course of his official duties." If she accepted accused's explanation that it was sponsorship which he sought from PW1 which had nothing to do with his duties, she was obliged to acquit.

In respect of sentence, it was submitted that the learned Sessions Court judge had erred in law and in fact. It is wrong in principle to impose custodial sentence especially for a first offender with an unblemished service record. The proper sentence should have been the imposition of a substantial fine.

The learned deputy public prosecutor ("the DPP") submitted that at p. 346 of the appeal record the learned Sessions Court judge had correctly used the beyond reasonable doubt test. The prosecution has proved that the money was received by the accused on 10 October 1996 corruptly. (See *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15 at p. 23). So it is not material whether there was one soliciting or two soliciting.

On 30 September 1996 PW1 went to the bus station and the accused approached him there. And the accused asked for the money. And the accused told PW1 since he did not have the money of RM1,000 at that time he will collect it later at PW1's house. Then about three days later the accused did come to see PW1 at his shop and asked for the money again. And the accused told him that he needed the money to go to Kuching as he was short of money. All along the question of sponsorship does not arise. When the accused met PW1 obviously the RM1,000 is meant for him.

On 10 October 1996 PW1 went to the accused's office together with an ACA officer Mr. Sow Guang Sin (PW5). A tape recorder was supplied to PW1 together with marked notes of RM1,000. The accused was alone in the office and the money was given and the accused received it and counted the money and put it in his drawer. There was no evidence of PW1 at this juncture that the accused told him that money was for sponsorship for donation.

The learned Sessions Court judge had correctly assessed the evidence of PW1 at p. 347 of the appeal record after having the advantage of seeing the demeanour and the accused's testimony in court which this court did not have that advantage. In support the following cases were cited:

(a) *Public Prosecutor v. Wan Razali Kassim* [1970] 2 MLJ 79.

(b) *Pie bin Chin v. Public Prosecutor* [1985] 1 MLJ 234 at p. 235.

(c) *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15 at p. 19.

The learned Sessions Court judge has considered that the RM1,000 was received by the accused corruptly based on various facts as envisaged at pp. 348 and 349 of the appeal record. And the learned Sessions Court judge's finding of fact is that it is difficult to accept the accused's evidence that PW1 volunteered to give the RM1,000 as a sponsor as PW1 is only operating a small stall with an earning of RM400 per month.

At p. 349, 4th paragraph, the learned Sessions Court judge has considered all the evidence in totality and she made a finding that the accused received the gratification corruptly. And she was correct that the presumption under s. 14 of the PCA arose. She correctly interpreted that the burden of rebutting the presumption by the accused is discharged if the court considers that on the balance of probability the gratification was not paid or given and received corruptly. (At p. 350 of the appeal record). And she concluded that the defence has failed in rebutting that.

At p. 351 of the appeal record the learned Sessions Court judge considered the issue of the prosecution's failure to call several officers who accompanied the accused on 10 September 1996 to PW1's stall whereby the soliciting occurred and concluded that this is not fatal and the adverse inference under s. 114(g) of the Evidence Act should not be invoked against the prosecution by virtue of the authority of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15.

At pp. 352 and 353 of the appeal record the learned Sessions Court judge had correctly assessed the testimony of the accused. And came to the conclusion that the money purportedly given as sponsorship is untrue. The learned Sessions Court judge came to a finding of fact that the RM1,000 is not sponsorship money and that the accused had used the family day celebration and the so-called sponsorship as a pretext. The learned Sessions Court judge had also correctly evaluated the evidence of other defence witnesses.

Further the learned Sessions Court judge was of the view that even if the accused's evidence that the said RM1,000 was for sponsorship for the family day she would still find the accused guilty of corruption because it was a donation corruptly solicited and corruptly received by the accused in the course of his official duties. This is envisaged at p. 354 of the appeal record. And this is supported by s. 2 of the PCA which defines gratification in many ways. See also the case of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15.

The learned Sessions Court judge made a finding that the accused has failed to satisfy the court that the money was not an illegal gratification on a balance of probabilities. She then found that the accused failed to rebut the presumption under s. 14 of the PCA or raise any reasonable doubt as to the truth of the prosecution's case.

In respect of sentence the learned Sessions Court judge had taken all relevant factors into consideration when she sentenced the accused to eight months' imprisonment. It was submitted that she was not wrong in arriving to that decision. In support an article entitled *Principles of Sentencing As Applied to Offences Relating to Bribery and Corruption* [1976] 2 MLJ xcvii was cited.

The learned counsel for the accused in his written reply contended, *inter alia*, as follows:

(1) The Sessions Court judge did not evaluate the evidence of PW1 correctly.

(2) Section 14 of the PCA has been rebutted.

(3) The trial judge's finding of fact that money was accepted corruptly by accused is clearly perverse.

(4) PW3 and PW5 are trap witnesses and cannot corroborate PW1.

(5) The learned DPP has not applied for retrial – this would be a compelling reason for not ordering a retrial if court held that conviction cannot stand because of the application of wrong burdens.

(6) The High Court should draw the correct inferences from the evidence produced.

I shall now deal with the testimony of PW1.

PW1 in his evidence (at p. 19 of the appeal record) stated that on 10 September 1996 officers from the Mukah district council came to his shop. One of them was the accused. After he was given a summon by the accused and after he acknowledged receipt the accused asked for RM1,000 from him.

PW1 (at p. 20 of the appeal record) said:

> The accused just asked money from me, he did not say for what purpose. I did not ask accused what was the purpose of the money ... I lodged a report with A.C.A. Sibu. I reported that they asked for money.

PW1 (at p. 21 of the appeal record) stated that "In the report, I stated 24 September 1996 a few officers from Mukah district council visited me. It is true the accused came to my shop again on 24 September 1996." And later he stated "I can't remember when the demand of RM1,000 was actually made."

P3 was lodged on 27 September 1996. In the report it is stated that:

> Pada 24.9.96 lebeh kurang jam 4.00 petang, semasa saya berada di kedai saya di Simpang Selangau/Mukah. Saya didatangi empat atau lima orang pegawai kesihatan dan Majlis Daerah Mukah. Salah seorang dari mereka telah meminta wang rasuah daripada saya sebanyak RM1,000.00 untuk menolong mendapatkan kelulusan lesen menjual minuman bagi kedai saya. Beliau telah mengarahkan saya membayar wang rasuah ini di pejabatnya (Majlis Daerah Mukah) pada pagi 30.9.96.

In this report it is stated that one of them solicited the money. The identity of this person was not disclosed in the report.

In cross-examination PW1 (at pp. 36 and 37 of the appeal record) was asked as follows:

Q: He did ask you to sponsor?

A: He did mention about word sponsorship on phone but I did not understand the meaning of sponsor.

Q: At close of examination-in-chief you were asked from the time accused asked for money from you till money was given, was it mentioned the money was for sponsor or donation and your answer was "No". You did say "No" to that, didn't you?

A: I didn't really listen to the questions, that's why I said "No".

Q: Did you not say to question by P.P. that from the time money was solicited till it was given there was no mention of sponsorship?

A: I cannot remember what I said this morning.

Q: You can take it from me you said "No" this morning?

A: I agree I said "No" this-morning.

Q: So you were mistaken or lying, this morning?

A: I was mistaken in saying "No" to the question.

Q: The accused did actually solicit sponsorship from you for Mukah Council Recreational Club?

A: Yes.

Q: The question of sponsorship arose on 21.9.96?

A: Yes.

Q: Who was the sponsor?

A: I myself.

At pp. 38 and 39 of the appeal record, PW1 was cross-examined as follows:

Q: During examination-in-chief you were asked about sponsorship and you had no difficulty in answering "No". Under cross-examination when questioned about sponsorship you hesitated and you said you did not understand sponsorship, do you remember that?

A: Yes, I remember.

Q: Can you explain to court why the difficulty? *a*

A: I have hearing problem.

Q – A:

I don't really understand the meaning of sponsorship, not that I had hearing problem. *b*

Q: Your answer to my question was after you understand sponsorship as explained by interpreter?

A: Yes.

Q: So that your answer in the morning to the P.P. was at that point of time you did not understand sponsorship? *c*

A: Yes, correct.

Q: Had you understood the meaning of sponsorship in the morning, yesterday, your answer would have been, yes, sponsorship was brought up? *d*

A: Yes, correct.

In cross-examination PW1 (at p. 39 of the appeal record) said "At first I didn't know I had to say sponsorship but later after accused was arrested, I did tell ACA there was mention of sponsorship." *e*

In cross-examination PW1 (at p. 41 of the appeal record) had stated that the accused did call him on 30 September 1996 at 10.07am and the accused brought up the subject of his sponsoring. At p. 42 of the appeal record PW1 had stated that when the accused called him at 4.10pm on 30 September 1996 the accused mentioned question of sponsorship again. *f*

PW1 (at pp. 43 and 44 of the appeal record) was cross-examined as follows:

Q: If I ask you to give me RM1,000/-, would you just give not asking what purpose? *g*

A: Yes, I would just give if I have money.

Q – Put: The money you gave to the accused was given willingly with no condition attached?

A: Yes, I agree. *h*

PW1 (at p. 49 of the appeal record) was cross-examined as follows:

Q: You knew accused was soliciting sponsorship from you, did you not?

A: Yes.

Q: So even when he asked you for money, you didn't ask what purpose? *i*

A: Correct.

In cross-examination (at p. 50 of the appeal record) PW1 said "I did go to ACA to withdraw my complaint but it was refused by ACA"

In re-examination PW1 (at p. 51) said as follows:

Q: You lodged a report to the A.C.A. that it was corrupt money and you testified in examination-in-chief there was no mention of sponsorship from the time accused first visited your shop till money was given. Now do you understand the meaning of sponsorship?

A: I don't understand the English version of sponsor. If word "sponsor" is translated into Foochow, I would understand. If word "sponsor" is used by a person, I won't understand the meaning.

Q: During cross-examination word "sponsorship" was mentioned, did you understand the meaning of sponsor when my learned friend asked you question?

A: Yes, I understood.

In re-examination PW1 (at p. 53 and 54 of the appeal record) was asked as follows:

Q: On that day (ie, 10.9.96) what did the accused talk about as far as sponsorship is concerned?

A: He just asked me to sponsor money and he did not elaborate for what purpose.

Q: How much money was solicited for the sponsorship?

A: RM1,000.

Q: You lodged a report to A.C.A., your report says "... contents of report read out ... " the RM1,000, what was it for actually, was it sponsorship of a big celebration or was it a corrupt money?

A: It is a corrupt money to prepare for my licence.

Q: Are you telling court now at no time you gave the money to accused as sponsorship?

A: Actually when accused asked for money, he said money was for sponsorship for sports and also he said for him to get me a licence. I don't know which is which.

In re-examination PW1 (at pp. 55 and 56 of the appeal record) was asked as follows:

Q: What prompted you to have intention to withdraw the report? *a*

A: I heard wrongly question about to withdraw report.

Q: Did you ever go to A.C.A. office to withdraw the report?

A: No.

Q: Did it ever cross your mind to withdraw the report? *b*

A: No, it didn't ever cross my mind to withdraw the complaint.

Q: Meaning you never had the intention to withdraw the report?

A: Correct.

c

Under further cross-examination PW1 (at p. 59 of the appeal record) was asked as follows:

Q: If this is so, you're not lying, then when you said RM1,000 was for sponsorship and to get licence you were adding on to something?

A: I am not telling lie. No, I was not adding something. *d*

Q: Then why earlier on you said no purpose was mentioned?

A: I did not say that earlier as I didn't hear clearly.

And (at p. 60 of the appeal record) PW1 was cross-examined as follows:

Q: You're adding on the last bit about to get licence, accused never told you that? *e*

A: I disagree.

Q: Then you should have told court that earlier on?

A: I forgot. *f*

PW1 (at p. 61 of the appeal record) was cross-examined as follows:

Q: Then you're lying?

A: He did mention about sponsorship.

Q: Then why did you tell the court "No", are you trying to fix accused person deliberately? *g*

A: No.

Q: Why didn't you tell court earlier on?

A: I don't know. I forgot. Sometimes I remember wrongly. *h*

From the abovementioned I find that there are numerous discrepancies and contradictions in the evidence of PW1 in his examination-in-chief, cross-examination, re-examination and further cross-examination. PW1 was inconsistent in his testimony as to the purpose of the money. He admitted that *i*

it was for sponsorship in cross-examination and later in re-examination he said it was both for the sponsorship and for licence but he did not know which is which.

PW1 has also stated that the accused asked for RM1,000 on 10 September 1996 but did not state what purpose. PW1 also did not ask the accused for what purpose. However, in P3 it was stated that one of the officers asked for RM1,000 on 24 September 1996. The identity of this officer was not stated.

I agree with the contention of the learned counsel for the accused that the way PW1 answered questions and explained away inconvenient answers he had given shows quite clearly that he is shifty, evasive and not reliable.

In *Public Prosecutor v. Lee Eng Kooi* [1993] 2 MLJ 322 His Lordship Vincent Ng JC (as he then was) at p. 333 said:

> The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

It would inevitably show that the evidence of PW1 is unreliable and the result is that the court would be left with no trustworthy evidence upon which the conviction could be based.

In *Mohamed Taufik v. Public Prosecutor* [1975] 1 MLJ 36, His Lordship Abdul Hamid J (as he then was) at p. 38 said:

> In regard to the handing over to the appellant of the notes marked by the officers of the B.P.R., Wong at the most can be described as a trap witness. In considering the evidence of a trap witness, it is, I agree, desirable that a trial magistrate should warn himself of the danger of acting on the uncorroborated evidence of such witness.

And in *Mohamed Mokhtar v. Public Prosecutor* [1972] 1 MLJ 122. His Lordship Sharma J at p. 122 said:

> I am unable to say how PW12 can, by any stretch of imagination, be called an accomplice. At the most he may be called a trap witness. The whole object of the Prevention of Corruption Act would be nullified if any public-spirited person decided to go to the Anti-Corruption Agency to tell them that a public

officer had demanded a bribe from him and if as a result of his information to the Anti-Corruption Agency a trap was set against the officer in question by asking the member of the public to go and pay the bribe demanded to the said officer. Corroboration of the testimony of a trap witness is no doubt desirable and it is not safe to convict the accused in the absence of that corroboration. I entirely accept that proposition.

PW1 is a trap witness. As a trap witness PW1 is also an interested party. As such PW1's evidence must be corroborated.

The learned Sessions Court judge had failed to adequately warn herself of the danger of convicting on the uncorroborated evidence of PW1.

PW3 and PW5 were also trap witnesses. As trap witnesses PW3 and PW5 cannot corroborate another trap withess. Further there is no evidence adduced by the prosecution to corroborate the evidence of PW1 that the payment of RM1,000 was to help PW1 to obtain a licence. The failure of the learned Sessions Court judge to warn herself of the danger of convicting on the uncorroborated evidence of PW1 was a misdirection.

In *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110. His Lordship Raja Azlan Shah FJ (as he then was) at p. 111 said:

While it is true that in a proper case a trial judge may fittingly convict on the uncorroborated evidence of an accomplice, this would be a very exceptional one.

On the totality of the evidence, I am of the view that it is wholly unsafe to convict the accused on the uncorroborated evidence of PW1.

The accused (at p. 167 of the appeal record) said:

On 21.9.96 I remember what happened on that day, I called Cheng Huo Kee to ask for help to look for sponsorship. I called by telephone. I wanted him to look for sponsorship. I made clear to him the meaning when I said sponsorship. I told Cheng Huo Kee the purpose why we need sponsorship and I told him about the budget estimated. I made clear the purpose was to buy Jersey for our Health Section. I actually first asked him to buy but he said he doesn't know. I indicated to Cheng Huo Kee the budget, I told him the budget is RM45/- per head for 22 players. And then he paused for a while and he told me he offered himself and promised to sponsor one thousand ringgit for us.

The accused's evidence that on 21 September 1996 he had telephoned PW1 and spoken to PW1 and that PW1 had agreed to sponsor RM1,000 is confirmed by the evidence of PW1 in cross-examination when he agreed that the question of sponsorship arose on 21 September 1996 and that he agreed to be the sponsor.

The accused in his evidence (at p. 174 of the appeal record) said that on 21 September 1996 immediately after he called PW1, he ordered the jersey by telephone to Mr. Joseph Lee (DW6), the manager of Ngiu Kee Supermarket, Mukah. He told Mr. Joseph Lee RM45 per head for 22 players and as long as branded jersey, whatever brand and colour blue and white. He told Joseph Lee they wanted the jersey immediately as they wanted to play on the next day, 22 September 1996. He told Joseph Lee the payment would be paid by towkay from Selangau.

Joseph Lee Luong Hong (DW6) testified in his examination-in-chief (at p. 248 of the appeal record):

> I was subpoenaed by ACA for this case. On 21.9.96 at 4.30 p.m. Thomas Ramli called me to order football jersey. He did indicate 22 sets. He indicated the prices was RM45.00 per set. He said he wanted branded jersey with white and blue colour. I think he did indicate the sizes. He did indicate how the jersey be paid. He told me there was sponsor from Selangor. He didn't tell me the name of the towkay. He told me the jerseys were required on 22.9.96 in the afternoon.
>
> I did supply these jerseys on 22.9.96 afternoon.

So it is clear that what the accused had told DW6 on 21 September 1996 that a towkay in Selangau had agreed to sponsor for the jerseys although the accused did not disclose the identity of the sponsor is not a fabrication. It was also not an afterthought. There was no evidence that DW6 had any motive to lie in order to help the accused. The accused told DW6 on 21 September 1996 of the sponsor for the jerseys before the abortive trap on 30 September 1996 and before his arrest on 10 October 1996.

The accused (at p. 175 of the appeal record) said:

> On 23.9.96 I remember I told Sidek b. Abas that towkay from Selangau promised to sponsor RM1,000/-. Sidek is in charge of (Chairman) Prize Sub-Committee for all the games in conjunction with the Family Day. I was a member of the Sub-Committee for prizes.

The evidence of the accused that on 23 September 1996 he told Sidek bin Abas (DW5) that a towkay from Selangau had promised to sponsor RM1,000/- has been corroborated by DW5 where (at p. 235 of the appeal record) he said:

> On 23.9.96 Encik Ramli did speak to me in my office. He told me a towkay from Selangau was going to sponsor cash for the jersey. He mentioned to me the amount was about RM1,000/-. He didn't mention the name of the towkay.

So the evidence of the accused that PW1 had agreed to sponsor RM1,000/- on 21 September 1996 is not an afterthought. The accused told DW5 of the sponsorship on 23 September 1996 before the abortive trap on 30 September 1996 and before his arrest on 10 October 1996.

The accused (at p. 175 of the appeal record) said:

> On 27.9.96 Sidek and I went to Ngui Kee Supermarket (to Joseph Lee's office) on 2nd floor. In the office, we talked about buying prizes for all the games.

DW5 (at p. 236 of the appeal record) said:

> I remember what happened on 27.9.96 Ramli Sutu and I went to Ngui Kee Supermarket. It was in the morning.
>
> ...
>
> At the ground floor we selected the material for our prizes and then Ramli told both Mr. Lee and I "don't be afraid to purchase some more prizes, he got sponsorship money to add to the prizes", i.e. the sponsorship money for the jersey and I knew that. Ramli also said if there is extra money from sponsorship money, it will be credited to our club.

DW6 (at p. 249 of the appeal record) said:

> The next occasion I saw Ramli was on 27.9.96 in the morning at 9.00 something. He was with another person. I know this person. His name is Sidek. I knew him as a person. I know he's also working at Council. They saw me in my office. They came to order for prizes. ...
>
> At the supermarket, we had a look at the goods and prices of the goods. I heard Ramli say to Sidek just choose the prizes and he said don't worry there would be money left.

So it is clear that the issue of sponsorship has been made known to DW5 and DW6 before the abortive trap on 30 September 1996 and before his arrest on 10 October 1996.

Further PW5, the A.C.A. officer, who arrested the accused on 10 October 1996, in cross-examination (at p. 103 of the appeal record) said "In the car accused never mentioned about sponsorship but in the office, he did but only after the money was given to me."

PW6, the investigating officer, in cross-examination (at p. 109 of the appeal record) agreed that the accused in his statement made to Encik Norazmi said that RM1,000 was sponsorship from Selangau towkay.

So the defence of the accused that the RM1,000 was sponsored by a towkay in Selangau was disclosed to the prosecution on the day of his arrest. There was no opportunity for the accused to fabricate the story. Neither was it an afterthought.

From the evidence of the accused, DW5 and DW6, it is clear that the learned Sessions Court judge had erred when in her judgment (at p. 354 of the appeal record) she said:

> The relevant point of time to examine the accused's mind would be before and during the receipt of the gratification. None of the witnesses was aware of accused's intention to seek donation from PW1. To my mind, the accused's defence that the money was a sponsorship voluntarily given by PW1 is untrue.

The learned Sessions Court judge had not correctly evaluated the evidence of the defence witnesses.

The learned Sessions Court judge (at p. 348 of the appeal record) said "The accused seemed secretive in his solicitation of the purported sponsorship. He merely telephoned PW1 without issuing any official letter to request for donation, even his superior officer was not informed about the matter."

Mohd. Johari b. Ibrahim (PW2) the secretary of the Dalat/Mukah District Council (at p. 66 of the appeal record) had stated "For football, we got donation from companies or individuals who are willing to sponsor or contribute. In such cases, we don't write letter but we usually issue receipt to those who donate cash. The receipt is issued by the treasurer of the club."

DW5 (at p. 247 of the appeal record) said "There was no directive from Encik Johari, the chairman of the club that sponsorship could only be sought for by letters."

So it is clear from the evidence of PW2 and DW5 that it was not a requirement that the request for donation must be by letter.

PW2 in cross-examination (at p. 69 of the appeal record) was asked "Is there any need for the person who solicited to report to you immediately or any time later?" and he answered "Any time later." So, it was not wrong for the accused not to inform PW2 that PW1 had agreed to sponsor RM1,000 earlier before his arrest on 10 October 1996. The learned Sessions Court judge had erred in not taking the evidence of PW2 and DW5 into consideration.

The evidence of DW6 shows that on 21 September 1996 he was told by the accused there was a sponsor from Selangau for the jerseys. Further DW5 has also testified that on 23 September 1996 the accused informed him that a towkay from Selangau was going to sponsor RM1,000 for the jerseys. So it was wrong for the learned Sessions Court judge to find that the accused seemed secretive in his solicitation of the purported sponsorship.

The accused also stated (at p. 168 of the appeal record):

> On 25.9.96 Cheng Huo Kee came to our office to see Hamdani Bin Mohamad. Hamdani is the in-charge of Licencing Unit. I know about that because Mr. Hamdani was sitting very near to me in the same office. When he saw Hamdani, Cheng Huo Kee was asking the application form for licence. Hamdani did give him the form. I saw that. I saw Hamdani helped him to fill the form. After Cheng Huo Kee had seen Hamdani, I had conversation with Cheng. After he finished with Hamdani, I called him to my table to issue to him an extension letter for food cleanliness inspection. The extension letter is to give him more time to clean his shop premises and to upgrade it to at least 50%.

The testimony of the accused that PW1 went to see Hamdani bin Mohamed (DW3) on 25 September 1996 to get the application form for a licence has been corroborated by the evidence of DW3.

DW3 (at p. 225 of the appeal record) said:

> On 25.9.96 Encik Cheng Huo Kee came to see me in my office Dalat/Mukah District Council, same office as accused's. I can't remember whether Mr. Cheng came to see me in the morning or afternoon. He wanted to apply for licence i.e. food stall licence.
>
> In the office I was in charge of licencing. Encik Cheng wanted to apply for food stall licence and he approached me. The form was sold at the counter, so I asked RM1.00 from him to buy the application form (for the licence). (P6 shown to DW3). Yes, this is the said form I referred to. Yes, I gave this particular form (P6) to Cheng. I filled in the form for Cheng Huo Kee. I filled the form completely except for the column for his signature and Bahagian V – Pengesahan. I was in charge of Licencing Unit of Health Section.

It is to be noted that PW1 did not state in his evidence that on 25 September 1996 he went to see DW3 to get the application form to apply for food stall licence.

The accused (at p. 169 and 170 of the appeal record) said:

> On 30.9.96 Cheng Huo Kee and his friend came to our office at about 10.30 - 10.35 a.m. On this occasion, I was alone, so they came and saw me. This meeting was never pre-arranged. ...
>
> Cheng said he wanted to hand over the application form and no one else was there. If Hamdani was in, I am sure I would ask him to pass the form to Hamdani. I would ask Cheng to do that as Hamdani was the person in charge of licencing. In the absence of Hamdani, it was proper that I should accept the form. When I accepted the form, I checked the form and it was not completed, so I advised them to complete the form and sent back to our Council office (not to me). After that I told them our Council procedure of

how to apply and approve licence. At first I explained to Cheng Huo Kee in Bahasa Malaysia mixed with English. I am not too sure whether Cheng Huo Kee understood my explanation, so I asked his friend who came with him to explain to Cheng that Health Section had no say in approval of licence even I have no say, it is up to Health and Licencing Committee. This guy with Cheng was not introduced to me by Cheng Huo Kee. When I asked this guy to explain to Cheng, it seems he did not agree to explain, so he asked me to explain again to Cheng, so I explained to Cheng in Bahasa mixed with Bahasa Pasar and Melanau dialect.

Mohd. Johari b. Ibrahim (PW2), the secretary of the Dalat/Mukah District Council, in his examination-in-chief (at p. 64 of the appeal record) stated that the accused "is the officer supervising Food Quality Unit. His appointment is Health Inspector (Inspektor Kesihatan). His duties are to supervise food quality for the whole of Mukah District. He is also head of the Health Unit. As head of Health Unit he controls the staff in Health Unit. He is not the administrator of the unit. The accused is not involved in the processing of licence. The accused is not directly involved in the Market and Perlesenan Committee (Jawatankuasa Perlesenan dan Pasar dan Kesihatan Awam).

PW2 in cross-examination (at p. 73 of the appeal record) said that in respect of licence the accused was not involved. The accused has no influence whatsoever. The application for a licence is usually submitted directly to Setiausaha and Setiausaha will give it to the section concerned ie, Licensing Unit.

Even the prosecution's evidence shows that the accused was not involved in the processing and issuing of licence. So, I am of the view that the testimony of the accused that on 30 September 1996 he told PW1 and PW3 that he had no say in the approval of licence is probable. As adverted to earlier, DW3 has stated that he was in charge of the licensing unit of the Health Section and that on 25 September 1996 he helped PW1 to fill in the form for licence (P6) except for the signature column and bahagian pengesahan.

PW1 has not stated in evidence how the accused was helping him to obtain the licence. In fact the prosecution has not adduced any evidence of what the inducement was.

The accused's testimony was not challenged by the prosecution in cross-examination. Since DW3 was not present on 30 September 1996, the action taken by the accused was reasonable. The accused's action by checking the form and informing PW1 on the Council procedure of how to apply and approve licence cannot be construed as showing favour to PW1 to assist him to get a licence.

The accused (at p. 172 of the appeal record) stated that on 10 October 1996 at about 10.35am PW1 came to his office. PW1 passed three forms to him, one is for application for licence and the other forms are for medical check-up. If Encik Hamdani had been in that morning he was sure he would advise PW1 to pass the forms to Encik Hamdani as he was in charge of licencing. This part of the accused's testimony was not challenged by the prosecution in cross-examination.

Since DW3 was not present on 10 October 1996 it was not wrong for the accused to receive the three forms as DW3 works in the same office. Further there was no evidence adduced as to how and in what manner the accused assisted PW1 to obtain a licence in his official functions.

In *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15 His Lordship Raja Azlan Shah FJ (as he then was) at p. 26 said:

> The emphasis here is on the gratification demanded and received as an inducement for official conduct. It is not the receipt of any gratification alone that constitutes the offence; it must be received as an inducement to do any official act. That phrase evidently means on the understanding that the gratification is received in consideration of some official act or conduct.

The accused (at pa.173 of the appeal record) further stated:

> After Cheng passed the money, I thank him. Then I told him this money is for this jersey, football jersey. I showed him 4 pairs of jersey left in my office. Yes, Cheng had a look at the jersey. After that I also showed him these are our prizes we got from football and telematch, our team won.

Thus the defence has explained that the money received on 10 October 1996 was not corruptly received but as sponsorship for the jersey. As such the defence has rebutted the presumption under s. 14 of the PCA on a balance of probabilities.

The learned Sessions Court judge (at pp. 354 and 355 of the appeal record) stated:

> He has thus failed to rebut the presumption that arises under section 14 of the Act or raised any reasonable doubt as to the truth of the prosecution case.

In *Mahadi v. Public Prosecutor* [1970] 1 MLJ 16 His Lordship Chang Min Tat J (as he then was) at p. 17 said:

> Not naturally on appeal, one of the grounds urged was that the court had placed a burden on the defence which the law did not. I have read through the 7-page judgment of the learned president very carefully, and I am unable to find anywhere the slightest reference to whether the defence, even though it was disbelieved, had or had not raised any reasonable doubt in his mind as to the

> guilt of the accused. For myself, I should not have thought that any magistrate would, after that very excellent judgment, if I may say so, of Suffian J (as he then was) in the case of *Mat v. Public Prosecutor* [1963] 29 MLJ 263 have fallen into the error this president did. There, the learned judge had advised in words of extreme simplicity and clarity and in tabular form that, if the magistrate or trial president did not believe the story of the defence, he was nevertheless bound to consider whether the defence, though disbelieved by him, had not raised any reasonable doubt in his mind. I commend to all magistrates that they keep in mind at all times this decision of Suffian J and, if I may be permitted to add thereto, I would suggest to magistrates and presidents that they refrain from using the words "disbelieve the defence" in their judgments and to bear in mind that they are bound to consider whether the defence has not raised a reasonable doubt in their minds as to the guilt of the accused.
>
> It is clear, therefore, that on this one ground alone the conviction cannot stand.

In *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ 169 His Lordship Mohamed Azmi SCJ (delivering the judgment of the Supreme Court) at p. 171 said:

> In this connection, counsel for the appellant had referred to us the case of *PP v. Saimin & Ors.* [1971] 2 MLJ 16 where Sharma J. held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] 29 MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

In the instant appeal the learned Sessions Court judge did not before convicting the accused give due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. On this ground alone the conviction cannot stand.

In view of the foregoing, I allow the appeal and set aside the conviction and sentence. The penalty of RM1,000 under s. 13 of the PCA, if paid, shall be refunded to the accused.